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4 Arbitrator
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8 **IN THE ARBITRATION BETWEEN THE WINDSOR FIRE PROTECTION DISTRICT**
9 **AND CAPTAIN TROY COLLIER**
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12 In re the Matter of the Termination of)
13 Captain Troy Collier)

14) **ADVISORY OPINION**
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21 **INTRODUCTION**
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24 This matter was heard at the law offices of Merrill, Arnone & Jones in Santa Rosa,
25 California on Tuesday, November 20, 2007 and Tuesday, January 15, 2008. The attorneys for
the parties submitted post-hearing briefs and thereafter rebuttal briefs. The arbitrator has
reviewed the hearing transcript and the documents admitted into evidence together with the
opening and reply briefs of the parties.

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I. CAPTAIN COLLIER'S EMPLOYMENT HISTORY

Captain Collier began his career as a volunteer firefighter at age eighteen. (I. 19:10-13)

Hereinafter citations to the transcript of these proceedings will be abbreviated with volume number, page and line designation. At the time of these hearings he was 41 years of age, had been an employee for approximately 16 years and was promoted to the rank of Captain in 2002. (I. 19:6-7, 20:3-5, 19:25, 20:1-2) Captain Collier testified that he had never been previously suspended, that one complaint had been made against him by a citizen and that in 1988 he was named among others as a defendant in a sexual harassment lawsuit which he believed was settled. (I. 20:9-10, 17-18, 19-20)

II. THE INCIDENT LEADING TO THE TERMINATION

On February 24, 2007 an awards dinner was held. (Ex. D-3) The dinner and ceremonies ended at approximately 10:00 P. M. (I. 31:21-23) Battalion Chief Gustafson testified that “. . . when I left the event, it concluded and it was a nice affair.” (II.109: 8-9) The Notice of Intended Discipline stated that the events for which discipline was to be imposed occurred “. . . after the District awards dinner.” (Ex. D-3)

A group of firefighters remained at “Charlie’s” [the site of the awards dinner] and continued to drink alcohol for about an hour. (I. 33:5-16, 34:8-17) About 11:00 P. M. Collier and a group got into a limousine and with the exception of one couple all agreed to go to “Patterson’s” [a Pub] (I. 39:9-11) Alcohol was consumed in the limousine. (I. 39:9-11) In the limousine was a cooler of beer and a supply of hard liquor. Occupants were serving themselves. (I. 41:14-21) At least two persons vomited while in transit. (I. 43: 14-16) The alleged improper touching of Donna Busch by Captain Collier was reported as happening during the trip to Patterson’s. (I. 130:13-17) The alleged fistfight between Ron Busch and Troy Collier occurred in the parking lot at the Exchange Bank. (I. 169: 1-10)

1 In a police report of the matter, the officer described both Captain Collier and Captain
2 Ron Busch as “intoxicated”. (Ex. D-8, Tab Q. pps. 3-4)

3 **III. THE GRIEVANCE PROCEDURE MATTER.**

4 Exhibit D-4, the Memorandum of Understanding between the District and its Captains and
5 Engineer/Firefighters contains a four-step grievance procedure. It is specifically noted that Step
6 2. of those procedures authorizes the grievant to submit the matter to the Fire Chief. (Ibid)

7 The fire Chief is Captain Collier’s stepfather. (I. 59:20-24). Battalion Chief Gustafson
8 testified that when he advised Chief Collier of the incident involving Captains Busch and Collier
9 Chief Collier stated, “ I want both of those guys to be fired.” (I. 110:1-2) Battalion Chief
10 Giordani testified that he asked the Chief to recuse himself because of “his close relationship
11 with Troy Collier.”(I. 234: 17-19)

12 The District by letter dated April 10, 2007 characterized the “Skelly” hearing accorded to
13 Captain Collier as the “. . . Informal Procedure” of the MOU notwithstanding that no actual
14 discipline as described in the MOU had been administered when the “Skelly” hearing occurred.
15 (Ex. D-5) To that extent the District has waived any claim that subsequent to the actual
16 discipline Captain Collier should have repeated the “Informal Procedure.” Captain Collier was
17 terminated via Memo dated March 27, 2007 by Battalion Chief Gustafson. (Exhibit D-2) At that
18 point to pursue Step 1 and 2 of the grievance procedure would have required Captain Collier to
19 submit his termination grievance to the person who terminated him and then to his stepfather
20 who had previously declared initially that both Captains should be fired and then recused himself
21 from the matter.

22 The District subsequently granted Captain Collier both step 3 and 4 of the procedure.
23 (Ex. D-7)

THE NOTICE OF INTENDED DISCIPLINE

I. PHYSICAL VIOLENCE

The Notice of Intended Discipline in part charges Captain Collier with a violation of paragraph VI. D. 1 of the District's Standards of Conduct by engaging in a fistfight at the Exchange Bank parking lot. That document contains the following key terms. First, paragraph D. is entitled "**Workplace Violence.**" Under 1. General policy, the text provides in relevant part that the District is committed to "...providing a safe, violence-free **workplace.** The policy statement continues and prohibits anyone on "District **premises or engaging in a District-related** activity from behaving in a violent or threatening manner." (emphasis added)

II. INAPPROPRIATE TOUCHING

The Notice states that the intended discipline is based upon evidence of an alleged inappropriate touching of Donna Busch by Captain Collier which escalated into the fistfight described hereinabove. The Notice cites SOG#A-3 as a supplemental basis for the intended discipline. The Notice states, "... employees shall adhere to the highest standards of conduct," including "Any comment or action which a reasonable person would find offensive". That provision is one of nine provisions in SOG#A-3 and continues to describe acts of unlawful discrimination on the usual statutory bases. It should be noted that of the nine provisions of SOG # A-3, six contain references to conduct on district premises.

THE NOTICE OF TERMINATION

While the termination notice does not recount the reasons set forth in the Notice of Intended Discipline, it adds a reason for termination which was not set out in the preliminary notice. "... and my familiarity with your past performance problems relating to people skills." (Ex. D-2)

STATEMENT OF ISSUES

At the hearing the parties agreed upon the following issue statement: “Whether the District’s termination of Captain Collier should be sustained.” There are five subordinate issues to be resolved in this matter: (1) Whether the events recounted in the Notice of Intended Discipline occurred on district premises or (2) while Captain Collier was engaged in a district-related activity. (3) Whether prior to the “Skelly” hearing, Captain Collier was given any notice that the claim of “past performance problems relating to people skills,” was to be a reason for his termination. (4) Whether District’s claim that Captain Collier did not properly follow the MOU grievance procedure is meritorious. (5) Whether Captain Collier can be held accountable for violation of SOG# A-23 or any independent claim that he “harmed the public service”.

ANALYSIS

I. Did Captain Collier’s alleged misconduct as set forth in the Notice of intended Discipline occur at the workplace?

The Standards of Conduct cited as the governing regulation supporting the claims against Captain Collier use the term Workplace and in paragraph 1. General Policy define workplace as the locus of “ district premises or [while one is] “engaging in a District-related activity.” Here the evidence shows clearly that the events that resulted in the Notice of Intended discipline were alleged to have occurred during the limousine ride to Patterson’s Pub and in the parking lot of the Exchange Bank. It is clear that by definition those events did not occur on “district premises”; that is on any district facility such as a fire station, maintenance yard, administration offices, et cetera.

II. Did Captain Collier’s alleged misconduct as set forth in the Notice of Intended discipline occur while he was engaged in a district-related activity?

Assuming, arguendo, that the awards ceremony of February 24, 2007 constituted a

1 “District-related activity” the question becomes whether the departure from the event in the
2 limousine and the subsequent events therein at the Exchange bank can reasonably be construed
3 as a continuation of the awards event. Captain Collier testified that about 10:00 P. M. at the
4 awards dinner location, he believed Battalion Chief Gustafson announced the conclusion of the
5 event and thanked everyone for attending. People then filed out. Chief Gustafson testified that
6 event had “concluded”.

7 The awards dinner/ceremony had clearly ended before the events that resulted in Captain
8 Collier’s discipline occurred. Moreover, the persons who got into the limousine by mutual
9 agreement were headed for a bar and grill to engage in activities wholly unrelated to the awards
10 dinner. Even if the findings of the District that Captain Collier had inappropriately touched Mrs.
11 Busch and punched Ron Busch are true, those events were not in the course of “engaging in a
12 District-related activity.”

13 **III. Was Captain Collier given notice and an opportunity to respond to the claims**
14 **in the Notice of Termination that his “. . . past performance problems relating to people**
15 **skills” was a reason for his termination?**

16 The Notice of Intended Discipline does not apprise Captain Collier that discipline is
17 about to be imposed for reasons other than the alleged events of February 24, 2007. In that
18 regard, the Notice is inadequate. Captain Collier had no opportunity in his “Skelly” hearing to
19 address that issue. To that extent he was denied due process.

20 **IV. Is Captain Collier’s alleged failure to follow the MOU grievance procedure**
21 **fatal to his seeking a judicial remedy for his termination?**

22 The District waived the informal step in its characterization of the “Skelly” hearing as the
23 informal step in the MOU grievance procedure, notwithstanding that the “Skelly” hearing
24 obviously preceded the actual termination which would have given rise to the grievance. (See
25 Statement of Relevant Facts hereinabove) To utilize steps one and two of the procedure would

1 have required Captain Collier to bring the termination grievance to the person who terminated
2 him and to the Fire Chief who had already recused himself from the matter and upon learning of
3 the incident in February had uttered his desire that both Captains be fired. Moreover, in spite of
4 its attempt to reserve its “grievance procedure” defense the District granted Captain Collier both
5 a Board hearing and arbitration. If the termination becomes the subject of litigation, the
6 Arbitrator believes any assertion that Captain Collier is barred by his failure to exhaust the
7 administrative remedies in the MOU grievance procedure will fail.

8 **IV. Whether Captain Collier can be held accountable for violations**
9 **of SOG#A23 or any independent claim that he harmed the public service?**

10 Exhibit D-8, Tab T, is SOG#A-23, which establishes a policy regarding “alcohol
11 use/consumption”. The Notice of Intended Discipline does not charge Captain Collier with
12 violation of any of the provisions of this document. The policy in paragraph 5. describes as
13 objectionable alcohol-related behavior that is “unlawful or unbecoming results in reduced public
14 trust and tarnishes the professional image of the men and women of the fire district (and the fire
15 service in general).” Notwithstanding that the record reflects throughout that the occupants of
16 the limousine on its way to the Pub had been drinking alcohol, that stops had to be made to let
17 people vomit, and that both Captains Busch and Collier were intoxicated, the District chose not
18 to address that issue pursuant to SOG#A-23.

19 The District in its reply brief argues that it has jurisdiction to sanction certain off-duty
20 behavior. Assuming arguendo that the arguments set forth by the District are valid; that is,
21 that discipline may be imposed for off-duty behavior that brings discredit to the agency and/or
22 harms the public service, its arguments are inapplicable in the instant case. The District did
23 not charge Captain Collier with harming the public service or discrediting the
24 WFPD.

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CONCLUSION

Captain Collier's termination cannot be sustained. The policy and SOG#A-3 upon which the District relied to effect this termination clearly requires the misconduct asserted to have occurred on district premises or while engaged in a district related activity. Neither of these conditions is established with respect to Captain Collier. Moreover, the District added a reason for Captain Collier's termination in the Notice of Termination which was not set forth in the Notice of Intended Discipline. He thus had no opportunity to respond to that charge in his "Skelly" hearing.

The District did not charge Captain Collier with a violation of any of the provisions of SOG#A-23, nor independently with any claim that he had harmed the public service or brought discredit upon the WFPD. Thus, those issues are not before the Arbitrator.

While the District may argue in a different forum that Captain Collier failed to exhaust his administrative remedies by strict adherence to the grievance procedure, the Arbitrator concludes that the argument will fail. The District conceded that Captain Collier had complied with the informal step. For the reasons stated hereinabove, compliance with Steps 1 and 2 would have been an exercise in futility. The District granted Captain Collier the 3rd and 4th steps of the procedure.

The Arbitrator recommends that the Board of Directors of the Windsor Fire Protection District reinstate Captain Collier with restoration of all lost wages and benefits from the effective date of termination or in the alternative enter into settlement discussions to resolve any of his potential claims of wrongful termination.

Respectfully submitted,

Thomas L. Hodges
Arbitrator

April 7, 2008